



**Musili v Kyondo (Environment and Land Appeal E010 of 2021)
[2022] KEELC 15723 (KLR) (11 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 15723 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT AND LAND APPEAL E010 OF 2021
LG KIMANI, J
OCTOBER 11, 2022**

BETWEEN

PETER LUKOYEL MUSILI APPELLANT

AND

MWANZIA KYONDO RESPONDENT

*(Being an appeal from the Judgment of Hon. M. Nasimiyu, sitting at Kitui in Kyuso
Principal Magistrate's Court in ELC Case No.7 of 2020 delivered on 11.11.2021)*

JUDGMENT

1. The appellant was the defendant in Kyuso Principal Magistrate's Court ELC Case No 7 of 2020 and he appeals against the judgement of the honorable M Nasimiyu Principal Magistrate delivered on November 11, 2021 on the following grounds:
 1. That the learned trial magistrate erred in law and in fact by failing to make necessary consideration on the evidence tendered in totaling the evidence adduced by the appellant.
 2. That the learned trial magistrate erred in law and fact in finding that there was a strong case for granting a permanent injunction, eviction and costs where there was not enough evidence by the respondent to the contrary hence arriving at a wrong decision.
 3. That the learned trial magistrate erred in law and fact in considering irrelevant factors and failing to consider relevant factors which were given by the respondents witnesses whose oral statement were contradicting hence arriving at a wrong judgment.
 4. That the learned trial magistrate erred in law and fact in basing her judgment on repealed law.
 5. That the learned trial magistrate erred in law and fact in failing to consider and analyze the reasons for the case and defence and its attached documents as set out in the appellant's



pleading and exhibit given such as the letter from the ACC which was not signed by the ACC himself but by another person hence coming to the wrong conclusion.

6. That the learned trial magistrate erred in law and fact in failing to record all the proceedings especially the evidence tendered by the appellant and his witnesses in the said ELC Case No 7 of 2020 and confirm the correct year of building his previous structures which were built in the year 2004 and not 2014 hence coming to the wrong decision.
7. That the learned trial magistrate erred in law and fact in showing open bias against the appellant hence failing to give the appellant and his witness a fair hearing even after producing valid documents over the suit land.
8. That the learned trial magistrate erred in law and fact in failing to consider that the respondent had interest on the appellant's piece of land situated at Kwamusya shopping center, Mukinga sub-location, Mukonga location, Mumoni sub-county in Kitui county in the Republic of Kenya which is the cause of the EMCL Case No 7 of 2020 Kyuso Law Court case.
9. That the learned trial magistrate erred in law and fact in failing to consider the ruling and proceedings from the elders, ACC of Mumoni sub county therein before the ELC Matter was filed in the law courts.
10. That the learned trial magistrate erred in law and fact failing to consider and apply the legal principles in land matters as set out in the defence and attached documents filed by the appellant herein hence reaching a wrong conclusion in law.
11. That the learned trial magistrate erred in law and in fact for failing to go for a scene visit of the un surveyed and confirm the boundaries and the ownership of the suit land, hence arriving to a wrong decision.

The appellant prays that the appeal be allowed and the judgment in the lower court be set aside with costs.

Summary of case before the Trial Court

2. The plaintiff before the trial court is the respondent in this appeal and he filed a plaint dated August 18, 2020 claiming to be the owner of all that un-surveyed land situated at Kwamusya market at Kyamusya village at Mukong'a sub-location, Mukong'a location which he inherited from his late father Kyondo Mulyungi. He claimed that on July 23, 2020 the defendant together with his agents/servants trespassed into the suit property and erected permanent structures thereon by building a shop without his consent. After reporting to the Assistant Chief Mumoni and being summoned, the defendant stated that the land belonged to him. The plaintiff filed this suit and prayed for a permanent injunction restraining the defendant from interfering with the suit property and an order that the defendant be evicted from the suit property and costs of the suit.
3. In his defence, the defendant claimed that the land belonged to him as he inherited it from his late father one Musili Maithya. He stated that he had constructed his two shops on the said land in the year 2004 and the plaintiff did not complain and that the building in question is an extension of the already constructed two shops. The defendant stated that the ACC Mumoni south/central visited the land on August 9, 2018 to deliberate the claim between the plaintiff herein and his father Musili Maithya and the meeting became chaotic and no ruling or judgment was delivered. He contended that the ruling/judgement produced by the plaintiff was signed by another party and not the ACC as claimed.



4. During the hearing, PW1, the plaintiff adopted his witness statement where he reiterated the contents of the plaint and produced as exhibits the documents attached to his bundle of documents. On cross-examination he stated that his father gave some people spaces to build temporary kiosks and he did not have any dispute with those people. He further claimed that he gave land to the APC Church and to building of a hospital. He further confirmed that as the owner of the suit land he gave the plaintiff a kiosk. He stated that the defendants' father wanted to take the land from him by force and he became aware of it when in 2017 he found one Thomas Mwema Mutuva building a permanent building and he claimed that the defendant's father sold the plot to him. He confirmed that the dispute was first heard by elders who found in his favor but gave the defendant's father four plots which he had sold. That he was dissatisfied by the finding of the elders and he went to the DO to appeal. That a decision was made by the Assistant County Commissioner awarding him the land.
5. PW 2 Ndei Muniyithya, stated that he knows both parties. He confirmed that in 2017-2018 the plaintiff had a land dispute with the defendant's father Musili Maithya. The dispute was heard by elders who awarded the land to the plaintiff but gave one plot to the Musili Maithya inside the plaintiff's land. The plaintiff appealed to the DO Mumoni by the name Martin Kagucia where the case proceeded and the entire land was awarded to the plaintiff. That Musili was given 7-21 days to appeal to but he failed to do so. He also confirmed that the plaintiff had sold him some plots. On cross-examination, he stated that the plaintiff gave land to the church and to the hospital. He stated that the plaintiff did not have any development on the suit land. He also stated that they did not have agreements at the time. He further stated that the DO read the decision after the meeting before the parties left.
6. PW 3 Stephen Musya Manzi adopted his written witness statement where he stated that he knew the land from 1946 when he migrated from Kiima, Mukitanini. He stated that the place Kwa Musya market was named after him since he was the first person to build a shop. He narrated the dispute between the plaintiff and the defendant's father from the elders to the DO and he confirmed that he knew the land in question belongs to the plaintiff. He stated that he was permitted by the plaintiff's father to put up a kiosk and that the defendant had not put up any structure. He was present when the DO arbitrated the dispute and said that the assistant chief was alive at the time.
7. The defendant DW 1 Peter Lukoyel Musili the appellant herein testified and he adopted his witness statement where he claimed that he was the owner of the land in dispute which he inherited from his father Musili Maithya who had inherited it from his father Alphonse Maithya. That he constructed two shops on the suit land in the year 2004 and the plaintiff did not complain. That the land case was filed in 2017 between his father and the plaintiff. He claimed that the ACC Mumoni visited the land on August 9, 2018 to deliberate that claim but the meeting became chaotic and no ruling or judgement was delivered. He stated that the ruling the plaintiff claims to have was questionable since he only came to know about it on August 5, 2020. That the plaintiff had presented an unsigned ruling and then presented another signed by another party and not the ACC and the same are the subject of police investigation. He claimed that his father had sold plots to several people and the plaintiff had not objected. That the building the plaintiff is complaining about is an extension of an already existing building constructed without complaint. The defendant also produced documents in evidence in a bundle of documents. On cross-examination, he stated that the judgment/ruling dated August 9, 2018 that was presented to court by the plaintiff was a forgery, it was unsigned and that the police were investigating its source.
8. DW 2 Daniel Mwema Kitheka adopted his witness statement where he stated that he purchased a piece of land adjacent to the disputed land from the defendant's father and there was no complaint from the plaintiff. He developed the land and built temporary shops and he has been operating the shops for 16 years. He only heard of the plaintiff's claim in 2020 when he claimed the defendant's land and he



believes the land belongs to the defendant who inherited it from his father Musili Maithya. He stated that he was not aware that the plaintiff had a case with the defendant's father. He started paying for the plot in 2004 but the agreement was in 2014.

9. In the judgment of the trial court, the learned magistrate noted that this was un-adjudicated/unsurveyed land and the two families have had a long-standing dispute dating several years back. The court noted that the ruling by the elders unanimously held that the land belonged to the plaintiff. The appeal to the Office of the Assistant County Commissioner against the decision to give the defendant's father some plots of land was decided in favour of the plaintiff and it was found that all the plots belong to him. The court held that there was evidence to show that the plaintiff is the proprietor of the suit land. The fact that the defendant had erected a structure on the suit property being undisputed, the court held that the plaintiff was entitled to an order of eviction against the defendant as well as a permanent injunction restraining him from interfering with the suit property.

Appellant's submissions

10. The appellant submitted orally in open court on July 28, 2022 and sought orders allowing the appeal and for the judgment of the trial court to be set aside. The appellant submitted that in the lower court, the respondent said that he started construction on January 23, 2020 when he had actually started construction in the year 2000.
11. The appellant highlighted that when cross-examined, the respondent said that he gave him a kiosk yet they are not related to each other. He also stated to the court that the respondent said that he gave the land to the church but later stated that it was his father who gave out the land.
12. Regarding the case at the County Commission, the appellant stated that they were heard but no judgment was given. He was surprised that the case had been determined. He noted that the letter dated August 9, 2018 has the stamp from the District Commissioner (DC) while at the back it has the other stamp from the Assistant County Commissioner. He also pointed out that according to the list of attendees a secretary was included yet there was none present.
13. The appellant reiterated that the land where he has constructed belonged to his father Alphonse Maithya. He also stated that there were people that his father sold plots of the land and he has constructed on the land since 2004 and there has never been a case arising on them. He mentioned David Katende Mwinzi and Daniel Mwema Kitheka which agreements for sale are on record.
14. He submitted that he has built on the left of the road from Kase to Irira and that there is no development on that part by the respondent. The land where the respondent said he gave to the church was on the right coming from Kase and that was their area and the appellant stated that he has built on his area. He therefore prays from the respondent to be restrained from disturbing his quiet possession of the land and for his appeal to be allowed.
15. There was no appearance from the respondent though an affidavit of service indicates that he was served with a hearing notice.

Analysis and Determination

16. This being a first appeal the court takes into account the role of an appellate court as stated in the case of *Gitobu Imanyara & 2 others v Attorney General* [2016] e KLR, where the Court of Appeal stated that;

“ [A]n appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though



it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.”

17. In *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] e KLR, the same was stated with regard to the duty of the first appellate court;

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

18. In my opinion, the grounds of appeal challenge the courts finding on oral and documentary evidence adduced, failure to consider relevant factors of evidence and law and thus arriving at a wrong finding. The Appellant dealt with the grounds of appeal together. The same approach to dealing with the grounds of appeal will be taken by this court and be summarized into whether or not the learned trial magistrate erred in law and in fact by entering judgment in favour of the respondent and in holding that the suit land belongs to plaintiff/respondent herein.

19. In determining this case the court takes into consideration the fact that the land in dispute is unregistered, unsurveyed and unadjudicated . In the case of *Caroline Awinja Ochieng & another v Jane Anne Mbithe Gitau & 2 others* [2015] eKLR the court held that:

“Unlike registered land where ownership is domiciled and founded in the register of titles, ownership of unregistered land and the ascertainment or confirmation thereof involves the intricate journey of wading through documentary history.

The simple reason is that unregistered titles exist only in the form of chains of documentary records. The court has to perform the delicate task of ascertaining that the documents availed by the parties are not only genuine but also lead to a good root of title minus any break in the chain. It is the delivery of deeds or documents which assist in proving not only dominion of unregistered land but also ownership. The deeds must establish an unbroken chain that leads to a good root of title or title paramount. A good compilation of the documents or deeds relating to the property and concerning the claimant as well as any previous owners leading to the title paramount certainly proves ownership. It is such documents which are basically ‘the essential indicia of title to unregistered land’: per Nourse LJ in *Sen v Headley* [1991] Ch 425 at 437.”

20. Similarly, in the case of *danson Kimani Gacina & another v Embakasi Ranching Company Ltd* [2014] eKLR the court found that:

“The law on unregistered land, unlike on registered land, is slightly unclear. Proof of ownership in the case of the former is found in documentary evidence which lead to the root of title. There must be shown an unbroken chain of documents showing the true owner. Once proof of ownership is tendered then the holder of the documents is entitled to the protection of the law.”

21. In this case there has been a dispute between the appellants father Musili Maithya and the respondent with the two parties laying claim to the suit land. The respondent claimed that he inherited the land from his father Kyondo Mulyungi while the appellant claims he inherited the land from his father Musili Maithya who had inherited it from his own father Alphonse Maithya.



22. The parties relied on oral evidence and documents that trace the dispute between the respondent and Musili Maithya over the suit land commencing with the decision by the Elders dated November 18, 2017. During the hearing before the elders each party presented two elders and the elders held that “The judgement of the case both sides elders agree that the land belongs to Mwanzia Kiondo.” Further the elders held that “The plot which was sold by Musili Maithya from plot of Muema Kitheka, to Muthuui Nzana both elders to give Musili Maithya because Musili Maithya was given there before by Mwanzia Kyondo both marrige to each other.”
23. The respondent was dissatisfied with the decision of the elders and appealed to the Assistant County Commissioner. From the letters produced in court it appears that the dispute was heard several times between the months of January, 2018 and August, 2018 without a solution being arrived at and the last sitting was on August 9, 2018 before the Assistant County Commissioner. According to the plaintiff the Assistant County Commissioner made a decision on the matter and he produced the same in court and the same is dated the same date August 9, 2018. However, the defendant disputed the authenticity of the said decision since as far as he was concerned the dispute was referred to the ACC and was heard on August 9, 2018 but no decision was rendered on the said hearing date or at all since chaos arose and the matter was not concluded.
24. The appellant stated that the document produced was a forgery, an allegation which was refuted by the respondent. However, the court notes that the appellant did not tell the court what then became of the dispute after the chaos arose. It would have been expected that if there were chaos the judgement would have been set for a different date and/or the appellant would have sought to know the outcome of the dispute. Further the appellant testified that when he noted the anomalies on the judgement relied on by the respondent he reported the same to the police but the question that arises is why the appellant could not at the same time seek clarification on the authenticity of the said judgement from the office of the Assistant County Commissioner or the County Commissioners office. In my view the explanation given by the respondent as to why the judgment was signed by someone else was a reasonable explanation and the same was that the ACC who heard the dispute had been transferred. Further, the appellant did not tell the court what became of the police investigations on the authenticity of the judgement as at the time of hearing of the suit. In the courts view the outcome of investigations would be expected to be known to the appellant.
25. Concerning the judgement of the Assistant county Commissioner, the trial court found that the appellant did not adduce any credible evidence challenging the authenticity of the document presented to court. The court found that it had no reason to doubt the document and stated that the plaintiff/ respondents evidence was corroborated by the evidence of two witnesses. The evidence of the two witnesses PW 1 and PW2 shows that they are long time residents of the area where the suit land is located and they confirmed that the suit land belonged to the plaintiff having inherited it from his father. They further testified that they were aware of the dispute over the land between the appellant’s father and the respondent herein both during the hearing before the elders and before the Assistant County Commissioner. PW 2 Ndei Munyiithia’s evidence showed that the decision of the Assistant County Commissioner was read on the date when the dispute was heard.
26. The plaintiff gave evidence that between himself and his father who was then deceased they gave land to several persons and institutions. The appellant together with others were given space to construct kiosks while the church and a hospital were also given land. Indeed PW 3 Stephen Musya Manzi stated that he came to know about the land in 1946 when he migrated to the area. He confirmed that the market where the land in dispute is located was named Kwa Musya after him having been the first person to build a shop. He confirmed that he was given a plot by the plaintiff to construct a kiosk and other plots were given to the church and a hospital. The witnesses further addressed the claim



by the appellant that his father Musili Maithya had sold plots to third parties and that there was no dispute over the same and he claimed that the plots that were sold were on the road reserve and had been marked x by KENHA. Further the elders' decision dated November 18, 2017 clearly shows that there was a dispute over the land sold by Musili Maithya. It therefore could not be said that the sale to third parties did not raise any issues.

27. It is the above evidence that the trial court found to have corroborated the documentary evidence produced in court. This court is satisfied that the trial court did not err in finding the said evidence to have been credible and corroborated.
28. On the other hand the appellant did not adduce evidence to convince the trial court that he inherited the suit land from his own father who in turn had inherited from his own father. I do find that in light of the evidence adduced by the plaintiff and his witnesses and the documents produced in court, the trial court was right in arriving at the conclusion that the suit land belonged to the plaintiff/respondent. The appellant has not convinced this court that the trial court was wrong. It is noted that the trial court is the one that heard the evidence of all the witnesses and was in a position to determine the credibility of the evidence adduced and the truthfulness of the said witnesses. This court does not have the benefit of observing the said witnesses as they testified and as they interpreted the documents adduced in evidence.
29. In the case of *Mumbi M'Nabea v David M.Wachira* [2016] eKLR the court held that:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

The above provision provides for the legal burden of proof. However, section 109 of the same act provides for the evidentiary burden of proof and states as follows:-

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”
30. It is further the courts view that the trial court did not err in relying on the oral evidence adduced in court and the decisions of the elders and the Assistant County Commissioner in arriving at her decision. Article 159(2)(c) of the *Constitution* of Kenya (2010) encourages and provides for alternative forms of dispute resolution and traditional dispute resolutions mechanisms and provides that:

“In exercising judicial authority, the courts and tribunals shall be guided by the following principles:-

 - (c) Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);”
31. The *Constitution* recognizes ancestral land as community land under article 63(1) (d) (ii). In my view, the decision by the elders was a form of traditional dispute resolution mechanism to resolve the conflict of ownership between the two parties. It is noted that the elders who heard the dispute were called by the parties themselves and are likely from that community and understand the history of the land well and the decision of the Assistant County Commissioner, Mumoni South who also heard the parties to the dispute and their witnesses.
32. From the foregoing findings, I see no reason to overturn the decision of the trial court and I find that this appeal lacks merit and the same is hereby dismissed with no order as to costs.



DELIVERED, DATED AND SIGNED AT KITUI THIS 11TH DAY OF OCTOBER, 2022.

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE

Judgement read in open court and virtually in the presence of-

Musyoki: Court Assistant

Peter Lukoyel Musili the Appellant in person

No attendance by the Respondent.

